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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 514

MARVIN ROTH,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on October 8, 1959.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 19.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 8, 1959 (Appendix, infra, p. 28). The jurisdiction of this Court is invoked under 28 U. S. C. A., sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether government agents who induce a defendant, who has never previously been involved in the illicit narcotic traffic, to make illegal sales of narcotics in violation of the narcotic laws are excused from such conduct because the defendant had previously dispensed non-narcotic drugs without authorization, resulting in such drugs being misbranded under the Food, Drug and Cosmetic Act.

2. Whether the defense of entrapment is not available to a defendant in a criminal narcotic case because the defendant had previously dispensed non-narcotic drugs without authorization resulting in such drugs being misbranded under the Food, Drug, and Cosmetic Act.

3. Whether the defense of entrapment raises a question of law, and as such is reviewable on appeal as a question of law rather than a question of fact.

STATUTES INVOLVED.

21 U. S. C., sec. 331 (k), provides:

The following acts and the causing thereof are hereby prohibited: . . .

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug,

device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

* * * * * * *

21 U. S. C., sec. 333, provides in part:

(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine . . .

* * * * * * *

26 U. S. C., sec. 4705 (a) (derived from the Harrison Narcotic Act, 38 Stat. 786), provides:

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

* * * * * * *

26 U. S. C., sec. 7237 (d), provides in part:

Whoever commits an offense, or conspires to commit an offense, described in section 4705 (a) or section 4742 (a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. . . .

STATEMENT.

Petitioner was convicted in a non-jury case on all counts of an eight count information. Counts 1 and 2 charged petitioner with having committed the felony of selling certain quantities of paregoric, a narcotic, in violation of Section 4705 (a), Title 26, U. S. Code. Jurisdiction over such an offense comes within the Bureau of Narcotics. Counts 3 through 8 charged petitioner with having committed the misdemeanor of dispensing certain amounts of dextroamphetamine sulfate tablets (which do not contain narcotics), resulting in said tablets being misbranded, in violation of Section 331 (k), Title 21, U. S. Code. Jurisdiction over this offense comes within the Food and Drug Administration. Petitioner was sentenced to eight years imprisonment under each of Counts 1 and 2, to be served concurrently. Petitioner was sentenced to one year imprisonment under each of Counts 3 through 8, to run concurrently with each other and with the sentence imposed under Counts 1 and 2.

Petitioner's defense at the trial was that he had been entrapped by agents of the United States into making the sales charged in the information. At the time of the occurrence of the alleged offenses, petitioner was twenty-eight years of age, married and the father of two young children. He had never previously been convicted of any crime (R. 181). He was a graduate of a college of pharmacy, and since his graduation had been employed continuously as a pharmacist (R. 178). At the time of the incidents in question, he was employed by a wholesale drug company and would visit various retail drug stores in order to sell merchandise. In addition to this full time job, he also worked as a pharmacist five nights a week (R. 182).

In September, 1956, according to the Government's evidence, an agent of the Federal Food and Drug Administra-

tion, commencing the investigation of the "Roth case" (R. 75), disguised himself as a truck driver and drove a tractor into a filling station, where he asked an attendant if he could sell him any aspirins that help keep persons awake. The attendant then telephoned petitioner, who had some months earlier told the attendant to call him if he had any call for "bennies" (a term used for dextro-amphetamine tablets, also designated as dexedrine tablets). Petitioner arrived at the filling station about thirty minutes later, where he was introduced to the government agent and sold the agent two bottles of dexedrine tablets (R. 223-224). Petitioner was not arrested after making this sale. The agent's purpose in going to the station was so that "evidence could be obtained for the purpose of instituting prosecution" (R. 23). The station attendant had some months earlier asked a druggist if the druggist could obtain any dexedrine tablets for him, and as a result a complaint had been made by the druggist to the Food and Drug Administration.

Sometime in the following months another agent of the Food and Drug Administration persuaded a physician to issue a fictitious prescription in the fictitious name of Dick McCoy, and calling for dexedrine tablets (R. 40). The agent took this prescription to a drug store where petitioner was employed in the evening, and had the prescription filled by petitioner. Thereafter in December, 1956, about two and one-half months later, still another agent of the Food and Drug Administration sought out petitioner at this drug store for the purpose of obtaining evidence, so that petitioner could be prosecuted (R. 83-84). The agent handed petitioner a piece of paper which had a prescription number written on it. It was the same as that on the fictitious prescription, which had been previously presented to petitioner for filling. The agent told petitioner that the prescription was for his son-in-law, Dick McCoy. Petitioner then filled the prescription, and he was

not seen to telephone anyone for authorization (R. 59). Petitioner was not arrested after making such sale. The agent then asked petitioner if petitioner could sell him some metandren tablets. Petitioner replied that this was a prescription item and that he should not sell it without a prescription (R. 58).

About ten days later this same agent again went to the drug store where petitioner was employed and handed a woman clerk a piece of paper with the same prescription number written on it (R. 61). The clerk took the prescription back to petitioner, where it was filled. Petitioner was not seen telephoning anyone prior to this refill. Petitioner was not arrested after this sale, but instead the agent asked petitioner if these dexedrine tablets could be purchased more cheaply by the hundred (R. 61) and said that his son-in-law, McCoy, travelled and could get rid of a lot of them. Petitioner stated that it would cost $30.00 per thousand. When the agent inquired as to how long it would take to get them, petitioner replied that he had them in his automobile outside, since he carried such items in his car for deliveries on his other job for the wholesale drug firm. They proceeded out to the automobile where petitioner sold the agent a 1000 tablet size bottle of dexedrine tablets for $30.00 (R. 64). Petitioner was not arrested after such sale.

Two days later the agent telephoned petitioner, and again asked him about metandren tablets (R. 66). They made arrangements for the purchase of them, but this sale was not consummated. Five days thereafter, the agent again called petitioner and asked about some spansules, which are dexedrine tablets which could be taken once a day. On the following day the agent met petitioner and paid him $9.00 for a bottle of capsules. Petitioner was not arrested after such sale.

During the telephone conversation which preceded this meeting, the agent told petitioner that McCoy had asked

about getting some paregoric, but that he (the agent) did not want to take a chance or have anything to do with it (R. 68). Petitioner replied with regard to the paregoric "that it was dynamite, that it means the Feds" . . . "that this other stuff is not bad, meaning tablets, but that he would not want to take a chance on the PG" (paregoric) (R. 88). This refusal of petitioner relative to paregoric was included in the agent's official report (R. 87-88).

Three days later the agent again called petitioner on the telephone and said that McCoy would be in town and that he wanted to introduce him to petitioner. The agent then spoke to one Witt, an agent of the Bureau of Narcotics, and although he told the narcotic agent of petitioner's unwillingness to become involved with the sale of paregoric (R. 96, 98), he nevertheless arranged with the narcotic agent to employ the disguise of Dick McCoy and to meet petitioner for the purpose of purchasing paregoric (R. 128-129). That was the purpose of the government agents in arranging the meeting with petitioner (R. 129), and this was the purpose of the food and drug agent in arranging to introduce the narcotic agent to petitioner (R. 130, 131).

The meeting was held several days later, and the narcotic agent was introduced to petitioner as Dick McCoy. This meeting took place some four months after the government's original meeting with petitioner at the filling station. During this meeting the narcotic agent asked for paregoric, and arrangements were made with petitioner to make the sale on the following day. The sale was made on the following day (R. 108). On this occasion arrangements were made for the sale of a larger quantity of paregoric and during the following week a second sale of paregoric was made to the narcotic agent. Several days later the narcotic agent arranged to meet petitioner to purchase additional dexedrine tablets, and it was at this

meeting in February, 1957, that petitioner was arrested for all of the sales made by him and the prescriptions filled since the previous September (R. 120).

Petitioner, testifying in his own behalf, stated that he had never told the filling station attendant that he would be willing to sell any narcotics or drugs. He stated that on the first meeting at the filling station with the person who he later learned to be a government agent, he was asked to sell aspirins which keep persons awake, but that he refused to sell them, since he had a family to consider and did not want to get into trouble (R. 184). He persisted in this refusal, but the agent kept insisting on the purchase, saying that he needed the dexedrine tablets. The sale was finally made. As to the refills of the prescription made in the drug store, petitioner stated that he had tried to contact the physician to obtain authorization for the refill, but was unable to reach him. When the refills were made, the agent began to inquire about the sale of paregoric, but petitioner refused to become involved, and said that he could not sell the paregoric, since it contained a narcotic. Petitioner stated that the requests for the purchase of paregoric were renewed repeatedly both in person and on the occasions when the agent would telephone petitioner. Petitioner again refused, saying that he had two very small children and that he had too much at stake to worry about it (R. 190, 192). He refused such sales on at least five occasions, and the suggestions by the agent relative to paregoric continued for about a month (R. 195).

Petitioner then stated that the agent began suggesting the sale of larger quantities of dexedrine, suggesting the profit that petitioner could make from such sales, and finally petitioner was introduced by this agent to another person (who he later learned to be the narcotic agent). A suggestion was also made by this other agent for the sale

of paregoric, and petitioner again refused, said that he did not want to fool with it, and that he had too much to lose. The conversation turned to petitioner's financial obligations due to the hospital and doctor bills which he had to pay for his wife and children, and to other loans and tax obligations which he had (R. 214-215). Petitioner was quite nervous at the time from working day and night on his several jobs, and had since been to a psychiatrist (R. 197). During such conversation the agent told him of the easy money he could make on such a sale, and petitioner finally broke down and agreed to the sales (R. 200).

The Court below (Appendix) affirmed the conviction and held that the defendant was not entrapped. It rejected petitioner's argument that he had shown no predisposition to commit the crimes charged, and that in any event he was entrapped into making the sales of paregoric after the earlier sales of dexedrine (the misdemeanors) were consummated. The Court held that the refilling of the prescriptions for dexedrine tablets and the sale of such tablets constituted similar offenses to the sale of narcotics, and that therefore petitioner could not be entrapped into the sale of narcotics after having made the earlier sales.

REASONS FOR GRANTING THE WRIT.

1 and 2. This case raises an important question in the administration of criminal justice and its application to the prosecution of the federal narcotic statutes. Whether agents of the United States may be excused from the illegal entrapment of a defendant to violate the narcotic laws if that defendant has or is engaged in conduct violative of the Food, Drug, and Cosmetic Act is a question calling for the final determination of this Court.

It is the contention of petitioner that even if he was not entrapped with regard to the sales relative to the Dexe-

drine tablets, nevertheless the evidence is clear that he was entrapped into making the sales of paregoric, and that the conviction on Counts 1 and 2 of the information cannot stand.

Counts 1 and 2 of the information charge petitioner with having sold certain quantities of paregoric. Paregoric contains a narcotic and thus comes within the jurisdiction of the Bureau of Narcotics. The violation of Title 26, United States Code, Section 4705 (a), under which Counts 1 and 2 were brought, constitutes a felony. Counts 3 through 8 of the information charge the sale by petitioner of Dexedrine tablets. These tablets do not contain any narcotics of any kind and the enforcement of the statutes relating thereto comes within the jurisdiction of the Food and Drug Administration. The violation of Title 21, United States Code, Section 331 (k), under which Counts 3 to 8 were brought, constitutes a misdemeanor.

Petitioner argued below that the evidence showed that petitioner was induced by acts of the agents of the United States to make all of the sales set out in all 8 counts of the information, and that therefore the trial Court should have acquitted him on all counts. The Court of Appeals held that petitioner was certainly not entrapped into making the sales relative to dexedrine tablets, and that the Government agents did nothing to implant in the mind of petitioner the deposition to commit these offenses. The Court held that the mere fact that the Government agents afforded the petitioner an opportunity to commit the offenses charged did not constitute entrapment.

It is petitioner's contention that even if he was not entrapped by Government agents into committing the sales of dexedrine tablets, he was nevertheless certainly entrapped into making the sales of paregoric, and that the fact that he may have been voluntarily engaged in the violation of the Food, Drug and Cosmetic Act does not excuse

the illegal entrapment of petitioner to violate the narcotic laws.

The evidence is here undisputed that petitioner had never previously been convicted of a crime, and the record is barren of any evidence that he had at any time been engaged in the narcotic traffic.

It is also undisputed that the Government agents did not for over a four month period arrest the defendant and charge him with any of the alleged sales of dexedrine but rather waited until after the two sales of paregoric were consummated and then chose finally to arrest the petitioner and charge him with both the misdemeanor and felony counts.

It is undisputed that while the Government agents were affording petitioner the opportunity to make the sales of dexedrine tablets, they suggested to petitioner the possibility of making sales of paregoric (R. 68). The Government's evidence itself showed that when such suggestion was made to petitioner, petitioner refused to make such a sale and stated that he did not want to take a chance on selling paregoric as he had a family to consider, and that he did not want to become involved in such traffic (R. 88-90). It is also undisputed that in spite of such refusal, which refusal was noted on the Government agent's official report, the same agent within three days made contact with a narcotic agent and made arrangements to introduce the narcotic agent to petitioner for the express purpose of purchasing paregoric (R. 128). This contact and introduction were made by Government agents notwithstanding the Food and Drug Administration agent explicitly informed the narcotic agent of the petitioner's refusal and reluctance to become involved in the narcotic traffic. It was only after such refusal by petitioner and the persistence by Government Agents that the two sales of

paregoric were effected. In defendant's testimony he related not only his first refusal to become involved in the sale of paregoric but testified that he had persisted numerous times in such refusal and that it was only after a one month period of persuasion and suggestions and inducements by Government agents that he ultimately submitted to such persuasion by reason of their suggestions that he could make easy money in an attempt to relieve his difficult financial situation.

Even if petitioner's testimony be completely disregarded, nevertheless on the basis of the Government's evidence we have a situation where petitioner, who was not shown to have been previously connected with the illegal narcotic traffic and who indeed refused to become engaged in such traffic at the suggestion of a Government official, is nevertheless pursued and ultimately induced to engage in such traffic by the Government agents themselves. Notwithstanding his expressed refusal to make a sale of narcotics, the agents of the Food and Drug Administration combined with the agents of the Bureau of Narcotics and arranged meetings with petitioner for the specific purpose of attempting to effectuate a narcotic sale. The narcotic agent was indeed introduced to petitioner as "Dick McCoy", a fictitious person whom the food and drug agent had described to petitioner as a person willing to engage in the narcotic traffic. Certainly it cannot be said that petitioner showed any readiness to engage in such traffic when the Government witnesses themselves testified to his reluctance and refusal to engage therein. We believe that under such circumstances the conviction in this case condones the implanting in the mind of an innocent person the disposition to commit a particular offense in order that a prosecution may result. In this respect the decision below is contrary to the principles enumerated in the leading cases of **Sorrells v. United States**, 287 U. S. 435, and **Sherman v. United States**, 356 U. S. 369.

As in those cases, so here the evidence does not show that the petitioner had any previous disposition to commit the crime charged but rather it was the Government agents who lured petitioner, otherwise innocent, to commit the offenses here charged.

Nothing here prevented the Government from effectuating the arrest of petitioner after each prior sale of dexedrine. At that point petitioner had purportedly committed a misdemeanor and was subject to prosecution therefor. The Government agents were apparently not satisfied therewith and sought to induce petitioner to engage in the far more serious offense of selling narcotics. Indeed in the instant case the evidence is stronger from petitioner's position than that in the **Sherman** case, in which entrapment was held to have been shown as a matter of law. For in the **Sherman** case the defendant was proved to have had at least some prior connection with the narcotic traffic, by reason of his having previously been twice convicted of narcotic violations. Also in the **Sorrells** case where the crime charged was the illegal liquor traffic, it was shown that the defendant in that case had a reputation for violating the liquor laws. In the case at bar, however, there is no evidence whatever that petitioner had either previously been convicted of a narcotic violation, or that he even had a reputation for violating such laws. See **Morales v. United States**, 6 Cir., 260 F. 2d 939; **Henderson v. United States**, 6 Cir., 261 F. 2d 909.

Nor can it be held that because the defendant had engaged, whether by entrapment or not, in the sale of dexedrine tablets, that he thereby showed a disposition to engage in the narcotic traffic. His expressed unwillingness to enter into the narcotic traffic would clearly seem to rebut such inference. Moreover the violation of the misdemeanor charges in Counts 3 through 8 of the information cannot be considered the commission of the same or similar crimes

as that charged in the felonies alleged in Counts 1 and 2. It is only where a defendant has already been engaged in an existing course of committing the same or similar crimes or where he has formed a design to commit the particular crime now charged that the defense of entrapment is of no avail.

Judge Learned Hand in **United States v. Becker**, 2 Cir., 62 F. 2d 1007, 1008, in discussing the only possible excuses for entrapment by Government agents, stated:

> "The only excuses that courts have suggested, so far as we can find are these: An existing course of similar conduct; the accused's already formed design to commit **the crime or similar crimes**, his willingness to do so, as evinced by ready complaisance . . . it has been uniformly held that where the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation **which would be no more than an instance in a uniform series.**" (Emphasis ours.)

Here there is not one scintilla of evidence to warrant a finding that petitioner had at any time been previously engaged in the sale of paregoric or indeed of any other narcotic. Certainly the sale of dexedrine cannot constitute the same crime or a similar crime to that of the sale of narcotics. The misdemeanor counts in the instant case were brought under Section 331 (k) of Title 21, United States Code. This section forbids the alteration of any labeling of any food or drug which results in the article being misbranded. Violation of this section, which is within the purview of the Food and Drug Administration, may be restrained by a civil injunction proceeding in the United States District Court. Title 21, U. S. C., Section 332. The Secretary of the Treasury may in case of the violation of the section in question merely issue a written notice or warning to the person committing such violation,

rather than report the matter for criminal prosecution or even institute civil injunction proceedings. Title 21, U. S. C., Section 336. The criminal violation of Section 331 (k) constitutes a misdemeanor and the violator is subject to imprisonment of not more than one year or a fine of not more than $1,000 or both such fine and imprisonment. Title 21, U. S. C., § 333.

Paregoric on the other hand, though it may be legally purchased in very small quantities, constitutes a narcotic and comes within the purview of the United States Bureau of Narcotics. Counts 1 and 2 of the information were brought under Title 26, U. S. C., Section 4705 (a). The punishment for the violation of such section is prescribed at Title 26, U. S. C., Section 7237. It is provided at Section 7237 that a violator of the narcotic statute **shall** be imprisoned for not less than five nor more than twenty years and in addition he may be fined not more than $20,000. A second or subsequent offender **shall** be imprisoned not less than ten nor more than forty years, and fined not more than $20,000. So severely did Congress intend to deal with violators of the narcotic statutes that it is provided at Title 26, U. S. C., Section 7237 (d), that if a person is convicted of violating the provisions of Section 4705 (a) the imposition or execution of sentence shall not be suspended and probation shall not be granted. Thus the trial Court is not permitted in its discretion to grant probation for even a first offender of the narcotic traffic laws and is required to impose at least the minimum five year sentence.

As stated in **Gore v. United States**, 357 U. S. 386:

> "Both in the unfolding of the substantive provisions of law and in the scale of punishment, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotic laws."

Thus it is evident that there is a wide dissimilarity between the offenses charged on the one hand in Counts 1 and 2 of the information and on the other in Counts 3 through 8.

It is submitted that Cougress by the various statutes above referred to evidenced the leniency with which the Food and Drug Laws under Title 21 shall be administered, as distinguished from the severity apparent in the narcotic law legislation. The statutes are searched in vain for evidence that Congress intended that the alteration of the labeling of a food or drug resulting in its being misbranded, could have been intended to be considered the same crime or a similar crime as the sale of narcotic drugs.

Thus even if petitioner was not entrapped into effectuating the sales of dexedrine tablets, nevertheless such sales could not in themselves and without other evidence show a predisposition on petitioner's part to engage in the narcotic traffic. It is apparent from the facts in this case that the Government agents were not content to prosecute petitioner on the misdemeanors which he had purportedly committed. They chose to bide their time and by a steady program of suggestion and enticement to entrap the petitioner into committing a narcotic violation and thereby to subject him to the far more serious penalties therefor.

Petitioner suggests that this action by Government agents cannot be condoned but to the contrary should be condemned, and that agents of the United States may not be excused from otherwise illegally entrapping a prospective defendant merely because he has in the past or is now engaged in a widely dissimilar and far less serious offense. It is urged that the authoritative decision of this Court on the important questions here raised will serve as a guide to the Courts in the proper administration of the criminal laws.

3. This case also raises the important issue, not raised in **Sherman v. United States**, 356 U. S. 369, and **Masciale v. United States**, 356 U. S. 386, as to whether the defense of entrapment raises a question of law rather than one of fact.

The appellate Court, in reviewing the conviction, applied an erroneous standard in the determination of whether entrapment had in fact taken place. The appellate Court held that the Government was entitled to the benefit of all favorable inferences which could be reasonably drawn from the facts proved and that if, when so viewed, the evidence was such that different conclusions might reasonably be drawn therefrom, a question of fact rather than of law was presented. It is urged that in so ruling the appellate Court treated the issue of entrapment as basically a factual rather than a legal issue. Petitioner concedes that in the determination of conflicting testimony a factual issue is raised, and that due deference should be given to the findings of the trial Court relative thereto. However, with regard to the conclusions to be reached from a review of all of the evidence on the question of whether a defendant was or was not entrapped, it is submitted that this presents a legal rather than a factual question, and that an appellate Court must review such conclusion in the same manner as it reviews other questions of law.

The question of what the facts of a particular case are is a matter properly for the trial Court. However, the question of whether those facts do or do not make out a case of entrapment is one of law, reviewable as such by the appellate Court. For only in such manner can there be a proper determination as to whether "rationally vindicated standards of justice" have been violated by the acts of government agents in affording the opportunity for the commission of the offense. **Sherman v. United**

States, 78 S. Ct. 819, 825 (concurring opinion). Only in such manner can there be proper and "significant guidance for official conduct for the future" in the proper enforcement and administration of the criminal laws. This question, it is urged, raises an important issue which plainly calls for determination by this Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,159.

Marvin Roth, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[October 8, 1959.]

Bernard J. Mellman (Morris A. Shenker was with him on the brief) for Appellant.

John A. Newton, Assistant United States Attorney (Harry Richards, United States Attorney, was with him on the brief) for Appellee.

Before Gardner and Vogel, Circuit Judges, and Mickelson, District Judge.

Gardner, Circuit Judge.

This case was commenced by the filing of an Information charging appellant Marvin Roth, a registered pharmacist, with the unlawful sale of drugs. The Information

contained eight counts. Counts One and Two of the Information charged illegal sales of tincture opium camphorated, or paregoric, in violation of Section 4705 (a), Title 26, United States Code, while Counts Three to Eight, inclusive, of the Information charged illegal sales of dextro amphetamine sulphate tablets, in violation of Section 331 (k), Title 21, United States Code. In the course of this opinion we shall refer to appellant as defendant. Defendant relied solely upon the defense of entrapment.

Counts One and Two charged the unlawful sale of paregoric, which contains a narcotic and hence such a sale constitutes a felony in violation of Section 4705 (a), Title 26, United States Code. The sales charged in Counts Three to Eight, inclusive, constituted misdemeanors violative of Section 331 (k), Title 21, United States Code. Defendant duly waived the right of jury trial and, with the consent of the United States Attorney and the court, the cause was tried to the court without a jury. The court was therefore performing the function of court and jury.

It is conceded by the defendant that he committed the offenses as charged in the Information, but contends that he was entrapped into so doing by agents of the Government, and that the evidence was of such a character that the Court should have sustained his motion for judgment of acquittal interposed at the close of all the testimony, on the ground that the evidence proved entrapment as a matter of law. The court denied defendant's motion for judgment of acquittal and found him guilty on all counts. As the Government was the prevailing party, we must view the evidence in a light most favorable to the Government. We must assume that all conflicts in the evidence were resolved in favor of the prevailing party and it is entitled to the benefit of all such favorable inferences as may reasonably be drawn from the facts proven, and if, when so viewed, the evidence is such that different con-

clusions might reasonably be drawn therefrom, a question of fact, and not a question of law, was presented. We turn to an examination of the evidence, viewing it in a light most favorable to the Government.

As the transactions described in Counts Three to Seven, inclusive, occurred before those described in Counts One and Two, we shall consider them first.

The evidence produced at the trial by the Government was substantially as follows. In support of the charge contained in Count Three of the Information the evidence shows that on September 29, 1956, Mr. William Boyle, an inspector with the Food and Drug Administration, drove into a filling station operated by one Charles Gibson, in a truck tractor which had been rented for the purpose. He was dressed in work clothes and had the appearance of a truck driver. His purpose was to conduct an investigation as to whether drugs were being illegally sold at this location. If they were, he was to endeavor to obtain evidence for a conviction of the guilty parties. Mr. Boyle spoke to Mr. Gibson, saying that he wanted some aspirin to keep him awake. Mr. Gibson then called the defendant, Marvin Roth, at his home in University City. He used the number defendant had previously given where defendant said he could be reached if he ever had any call for "bennies." Gibson testified that he told defendant that a trucker was on the lot who wanted some "bennies". This term was subsequently explained as one which truck drivers and others use when referring to dextro amphetamine tablets. Defendant asked Gibson how many the trucker wanted, as it must be worth his while to come over. Gibson mentioned five hundred or a thousand tablets. Defendant said that he would come over, but that it would take a little while as he had some distance to travel.

Boyle waited on the filling station lot and defendant arrived in thirty to forty-five minutes. Defendant was

then introduced to Boyle and he asked Boyle for some identification to show that he was a truck driver. Boyle refused to identify himself, but defendant observed that Boyle's left arm was sunburned, and said that Boyle must be a truck driver. Defendant held two bottles in his hands while this conversation was in progress. He then gave them to Boyle in exchange for fifty dollars. Boyle testified that each bottle contained a thousand dextro amphetamine tablets. Boyle testified that this was the substance of his entire conversation with defendant prior to the sale.

On Count Four the evidence shows that on October 10, 1956, Inspector Joseph Gebhart of the Food and Drug Administration obtained a prescription for fifty dextro amphetamine tablets from Dr. Bernard Flotte, a physician, in the name of Dick McCoy. McCoy was a fictitious name, which fact was known to the doctor issuing the prescription. Gebhart took the prescription to the Joseph Drug Store in St. Louis on the same date and had it filled. The charge was $2.50. The prescription called for the consumption of two pills per day by the patient and it was not to be refilled.

On December 29, 1956, Inspector Leo Cramer of the Food and Drug Administration went to the Joseph Drug Store and gave a piece of paper with the prescription number on it which had previously been given by Gebhart to the clerk and defendant refilled the prescription. He did not obtain permission from the doctor to do so. On cross-examination defendant admitted this and also that he had no conversation with Cramer prior to the refill.

After receiving the tablets, Inspector Cramer asked defendant if he could sell him some metadaren tablets. Defendant said that he "should not" do so as it was a prescription item. Cramer did not press him further, merely saying that he would try to get a prescription.

In support of Counts Five and Six, the Government's evidence was to the effect that on January 8, 1957, Inspector Cramer again went to the drug store and asked to have the McCoy prescription filled. Defendant did so, again without attempting to contact the doctor who issued it. Defendant admitted this. After obtaining the tablets, Cramer asked defendant if they would be cheaper if purchased in amounts of one hundred. Defendant said that they would not be much cheaper. Cramer then said that his son-in-law, McCoy, traveled down through Rolla on a truck route and could get rid of a lot of them. Defendant said he should buy them in larger quantities. Cramer asked where they could be purchased, and defendant said that he could provide them. When Cramer asked how long it would take to get them, defendant said he had them outside in his car. Defendant then took Cramer to his car and sold him a bottle with a thousand dextro amphetamine tablets, for $30.00.

As to Count Seven, the Government proved that on the evening of January 10, 1957, Cramer called defendant on the telephone at the Joseph Drug Store. In this conversation Cramer arranged to buy a thousand dextro amphetamine tablets and a hundred metadaren tablets. They arranged to meet but did not do so until a later time.

On January 15, 1957, Cramer called defendant a second time at Joseph Drug. This time he asked if defendant knew about dextro amphetamine tablets that were slow in disintegrating in the system after being taken. Defendant said that Cramer meant spantules and that he had them in his car. He said that if Cramer would come right over to the store he could get them. Cramer ordered a hundred spantules and arranged to pick them up the next day.

During this telephone conversation, Inspector Cramer said that McCoy had asked about obtaining some "PG".

This term was subsequently explained as meaning paregoric or tincture opium camphorated, a drug containing narcotics. Cramer continued the conversation by saying that he didn't want to have anything to do with paregoric. That he did not want to take a chance. Defendant said, "I know what you mean." "You can get two to three" years for selling it. Cramer then said that he "was afraid of it; it was not worth the risk." Cramer said that he would bring McCoy down if defendant wanted to take a chance. Cramer said that McCoy had been paying $45 or $50 a gallon. Defendant then said that he could get it for less than $45. Defendant further said that paregoric was dynamite and that it meant the "Feds". He said that tablets were not so bad but he did not want to take a chance on "PG".

On January 16, 1957, Cramer met defendant outside of Nash's Drug Store, 1601 South Jefferson Avenue, St. Louis, Missouri, pursuant to prior agreement. Defendant then gave Cramer a bottle of spantules for which he received $9.00.

As has been observed, all these transactions resulting in sales violative of the law transpired before the sales described in Counts One and Two of the Information. In making these sales defendant was certainly not entrapped. The Government agents did nothing to implant in his mind the disposition to commit these offenses in order to prosecute, nor did they incite, induce, instigate or lure the defendant to commit these offenses which he would not otherwise have committed, and it is well settled that the mere fact that officers of the Government afford an opportunity to commit the offense charged does not constitute entrapment. **Sorrells v. United States,** 287 U. S. 435; **Sherman v. United States,** 356 U. S. 369; **Masciale v. United States,** 356 U. S. 386; **Butts v. United States,** 8

Cir., 273 Fed. 35; **Marbs et al. v. United States**, 8 Cir., 250 F. 2d 514. In **Sherman v. United States**, supra, it is said:

> "* * * the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials. * * * To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

We shall now consider the evidence which it is claimed by the Government sustains the conviction of defendant on Counts One and Two. In considering this evidence it must be borne in mind that the defendant had confessedly already committed the offenses charged in Counts Three, Four, Five, Six and Seven of the Information, and these, we think, were similar offenses. He could not be characterized as an unwary innocent. In fact, in connection with the transaction described in Count Seven, defendant had a conversation with a Government agent with reference to a possible sale of paregoric which was the subject of sale described in Counts One and Two. In support of Count One the Government's witness Witt testified in substance that on January 21, 1957, he met the defendant in the 1600 block of South Jefferson at the rear of the Nash Drug Store, Inspector Cramer being also present. Cramer and he had been waiting there for defendant. When defendant drove up and parked his car Cramer and he got out of their car and walked to the rear of the drug store where they met defendant. Cramer and defendant had a conversation and then Cramer introduced Witt as Dick. Defendant turned to Witt and asked, "What do you want?" The witness told him he wanted some paregoric. Defendant asked Witt what he would

pay for it and he told him he was looking for the best deal that he could get. Defendant then told Witt that he knew he had been paying forty-five and fifty dollars a gallon and offered to sell it to him for forty dollars. Witt asked defendant if he would give a better price on a larger quantity. Defendant told Witt that he would sell him two gallons for seventy-five dollars and stated, "I will meet you at Eighteenth and Lafayette at ten minutes to five tomorrow," which was Tuesday. Defendant then walked on and entered the store, and Inspectors Cramer and Witt left the vicinity. Witt next met defendant the following evening at Eighteenth and Lafayette at 5:20 P. M. Defendant on seeing Witt said immediately, "Have you got anything with your name on it?" Witt told defendant, "I don't know anything about you, you don't know anything about me. Let's keep it that way." Defendant agreed that this was a good idea. Witt asked if he had his merchandise, and defendant said, "Yes, it is in the car." Defendant then directed that Witt drive his automobile from the corner and park it in the rear of defendant's automobile to transfer the packages. Witt did this and again met defendant on the sidewalk. Witt asked him where the PG was, and defendant stated that it was on the floor in the front of the car, meaning his car. Witt asked defendant if he wanted the money now and he said, "No, leave it on the front seat," so Witt opened the car door, and sat down on the front seat and counted out seventy-five dollars and as he started to pick up the packages he noticed that they were not labeled as paregoric. He asked defendant, "Is this paregoric? It is not labeled and I don't want to get the wrong stuff," and he pointed out the initial "P" which was printed on the gallon carton, and stated, "That stands for paregoric." Witt then took the two cartons and walked back to the Government car and placed them in the car and met defendant again, and defendant said, "You know, we have got to be careful

about this, the Government would be interested." Defendant then asked when Witt wanted an additional supply and was told either this week or next, and defendant asked how much he could handle and Witt said five or ten gallons. This testimony was corroborated by the witness Cramer.

In support of the Second Count the testimony of Government witnesses was to the effect that on January 25, 1957, defendant and Witt met in Forest Park as previously agreed and defendant sold five gallons of paregoric to Witt for one hundred seventy-five dollars.

The sale charged in Count One was consummated, as has heretofore been observed, after the sales charged in Counts Three, Four, Five, Six and Seven, all of which were violative of the law and made without any semblance of persuasion. The only words indicating that defendant was reluctant to sell paregoric were those mentioned in connection with sales described in Counts Four to Seven and it is worthy of note that it was the Government agent who first indicated a reluctance to be involved in a purchase of paregoric because of the penalties involved. The defendant at that time simply agreed with the suggestion made by the Government agent. He showed no reluctance, nor was there any persuasion involved when the actual transactions involving the sales described in Counts One and Two took place. True, the defendant testified to some protests but they apparently occurred during the transactions involved in Counts Four to Seven and the court manifestly credited the testimony of the Government witnesses. They gave their version of the transaction, the defendant gave his, and the court as the trier of the facts was the judge of the credibility of the witnesses and resolved all doubts in favor of the Government.

Defendant cites and relies upon a number of decisions holding that the trial court erred in holding as a matter

of law that there had been no entrapment. These authorities in effect hold that the question of entrapment was one of fact to be determined by the jury, and not one of law. In the instant case the defendant is contending that the question of entrapment was one of law. We cannot agree. In principle the cases cited by defendant support the Government's contention in the instant case, to-wit; that the question of whether or not defendant was entrapped was, under the evidence in this case, a question of fact. The fact that the case was tried to the court without a jury cannot change the applicable rule. We conclude that the court was warranted in finding as a fact that there was no entrapment in this case.

The judgment is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

United States Court of Appeals
for the Eighth Circuit.

No. 16159 . . . . September Term, 1959.

Marvin Roth, Appellant,

vs.

United States of America.

Appeal from the United States District Court
for the Eastern District of Missouri.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Marvin Roth, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

October 8th, 1959.